

EXHIBIT E

1

2 SUPREME COURT OF THE STATE OF NEW YORK
3 NEW YORK COUNTY - CIVIL TERM - PART 3

-----X

4 LESLIE DICK WORLDWIDE, LTD.,

5 Plaintiff,

6 -against-

7 MACKLOWE PROPERTIES, INC., et al.,

8 Defendants.

-----X

9 Index # 600222/06

10 PROCEEDINGS

11 60 Centre Street
12 New York, New York 10007
13 January 18, 2007

14 B E F O R E :

15 HONORABLE KARLA MOSKOWITZ,
16 Justice.

FILED
2/28/07
COUNTY CLERK
NEW YORK COUNTY

17 A P P E A R A N C E S :

18 EDWARD W. MILLER, ESQ.
19 575 Lexington Avenue - 28th Floor
20 New York, New York 10022
21 BY: EDWARD W. MILLER, ESQ.
22 Attorney for Plaintiff

23 BUTLER, FITZGERALD, FIVESON & McCARTHY
24 350 Fifth Avenue - Suite 6215
25 New York, New York 10118
26 BY: DAVID J. McCARTHY, ESQ.
Attorney for Defendant

27 ALDORINE WALKER, RPR
28 Official Court Reporter

AW

2

1 | Proceedings

2 THE COURT: This is a motion to dismiss by
3 the remaining defendants, or are there other defendants
4 also?

5 MR. McCARTHY: The remaining defendants.

6 THE COURT: Remaining defendants, George
7 Soros and Soros Fund Management, LLC. And in the
8 interim, between the making of the motion, and I guess
9 the service of the opposition papers, I handed out a
10 decision on the motion to dismiss by the other
11 defendants, and that is dated November 29th and filed
12 December 5th. It looks like it was filed in the County
13 Clerk's office.

I don't know what there is to argue because,
certainly, Soros defendants are even more removed from
the transaction than the defendants for which I granted
dismissals. So I will hear from the plaintiff.

18 MR. MILLER: Judge, my name is Ed Miller. I
19 filed a notice of appearance this morning.

20 THE COURT: I guess I don't have your card.
21 Do you happen to have a card with you?

22 MR. McCARTHY: Your Honor, before we start, I
23 have the original reply memorandum. I think you might
24 have received a courtesy copy.

25 THE COURT: Fine. Do you want to give me the
26 original, and I will do something with the photocopy.

3

1 | Proceedings

2 Go ahead, Mr. Miller.

3 MR. MILLER: Judge, there is two Appellate
4 Division cases that I honestly believe control the
5 question before the Court. May I hand them up to the
6 bench?

7 THE COURT: Have you shown counsel copies?

8 MR. MILLER: I have copies for him.

9 MR. McCARTHY: He did not show me, and they
10 were not cited in the appropriate brief.

11 THE COURT: Who were they cited by?

17 THE COURT: Are we going to sit here and read
18 these? Banner we used, right?

19 MR. MILLER: Yes. But only the second
20 Appellate decision, not the first one.

THE COURT: Do you want an opportunity to
read these decisions, Mr. McCarthy?

23 MR. McCARTHY: David McCarthy. I represent
24 Soros.

4

1 || Proceedings

That's what you are relying on, these decisions that
you are handing up?

4 MR. MILLER: Yes, these two decisions, yes.

7 THE COURT: All right, where are they?

8 MR. MILLER: The pertinent language in both
9 decisions is that there is a duty upon those who
10 conduct auctions to conduct them fairly. That is the
11 beginning and middle and end of my argument here today.

12 There was a duty upon all those who participated
13 in this auction to each other to do it fairly. And
14 that duty was violated by the participant who have been
15 sued, according to the allegations of the complaint.

16 Now, Banner was later dismissed out because of an
17 agreement, which excused any prior misrepresentations.
18 However, what's of interest for this decision is the
19 lower court's decision, which denied a motion to
20 dismiss and let the case proceed on duty to conduct a
21 fair auction.

I believe that the allegations in the complaint
are sufficient against the Soros entities. I think
they are clearly sufficient to state an action for a
violation of this duty.

Now, on a motion to dismiss, if defendant says

1 || Proceedings

2 well, we never said that before; he is right. But we
3 don't have to. I'd like to just read into the record a
4 quote, just one sentence from Wiener versus Lazard
5 Freres, 241 A.D.2d 114, First Department 1998: "So
6 liberal is the standard under these provisions,"
7 talking about CPLR Section 3211(a)(1), that the test is
8 simply whether the proponent of the pleading has a
9 cause of action, not even whether he has stated one."

10 So the question, and there is other law cited,
11 many cases cited, saying that whether or not we stated
12 the cause of action, whether or not we vocalized proper
13 legal theory in our complaint or even in our argument
14 up to this point is not controlling. What's
15 controlling is whether or not there is a viable legal
16 theory that can convert a bunch of facts into a
17 lawsuit. So I concede before the Court that we have
18 not vocalized the theory I'm coming here with, but
19 submit that that's irrelevant to the Court's decision.
20 This theory is either viable or not.

21 I'd like to just read the citation, if I may, of
22 Valeo and the first Banner Appellate decision, which
23 recognize the duty to conduct an auction fairly. Valeo
24 Engine Cooling versus Atkinson, 240 A.D.2d 176, First
25 Department 1997, which would be after the Banner second
26 decision, which is relied upon by defendants throughout

1 Proceedings

2 this. And the Banner decision, which recognizes a duty
3 to conduct a fair auction, which is at 181 A.D.2d 479,
4 First Department, again, 1992. There are cases in
5 other states recognizing the same duty on that. I'm
6 not citing them at this time, unless the Court would
7 request that I do so.

8 In the event that the Court would be --

9 THE COURT: I have read these cases.

10 Do you want to comment on these decisions?

14 THE COURT: Let me cut you off. I have read
15 these decisions. And the way I read these decisions,

16 the Appellate Division is saying that once the parties,
17 and this is a quote from Valeo, V-A-L-E-O, and it's
18 underlined by counsel: "Once the parties agree to a
19 private auction to select a potential purchasers who
20 submit bids, the auction have to be conducted fairly
21 pursuant to its terms." The terms of the auction in
22 this case were set forth in the two documents that the
23 plaintiff received. I don't know if he signed them.
24 One is called the confidentiality agreement, and the
25 other is -- I'm sorry. I have to go back to my
26 decision. They were the two documents, right?

1 Proceedings

2 MR. McCARTHY: Yes, your Honor.

3 THE COURT: And you can't say, oh, there were
4 only oral representations or anything like that.

5 MR. MILLER: We are not saying that.

6 THE COURT: No, but the two written documents
7 control this auction. One is entitled "principal
8 confidentiality statement," right? That was July 16,
9 2003. And then there is another one, right?

10 MR. MILLER: A letter, but that's irrelevant.
11 We agree to those two --

12 THE COURT: But the terms of those writings
13 control. And as long as the seller abided by the terms
14 of those writings, which they did --

15 MR. MILLER: There was --

16 THE COURT: No, I'm sorry. You are really
17 rearguing a decision I have already made. And these
18 cases don't say anything different than what has
19 already been stated in my decision, which says there
20 was a fair auction, according to its terms and the
21 written terms, and that's it. I'm not going beyond it.
22 You are not arguing anything different about the Soros
23 defendants. You are not arguing anything as to these
24 particular defendants that's any different from the
25 arguments that you would have to make to keep into the
26 case the other defendants. There is nothing particular

1 | Proceedings

about the Soros defendants. In fact, there is even less as to the Soros defendants, because they are not the ones that were running this auction. So, therefore, I don't see any reason why my decision, on the motion to dismiss by the Soros defendants, should be any different. And it is actually controlled by my decision as to the other defendants.

9 MR. MILLER: Can I take one minute, 60
10 seconds?

11 THE COURT: Yes.

1 || Proceedings

THE COURT: Counsel, if you want to make that argument, you don't make that argument against the Soros defendants, right, because the Soros defendants did not conduct this auction, okay. And all your arguments in your papers, as opposed to what you are saying now about some sort of scheme or conspiracy or whatever, I found there was -- I'm not going to repeat my decision. What you are arguing has nothing to do with these particular defendants. They should have moved at the same time as the other defendants, and it would have been in the same decision. If you have another argument you want to make, you have the Appellate Division, if you feel this was an argument you should have made but didn't make, because you didn't make it. No one made that argument before.

17 MR. MILLER: Which we do.

24 || Thank you.

* * * *

10

1

Proceedings

2

It is hereby certified that the foregoing is a true and
accurate transcript cf the proceedings.

3

4


~~ALDORINE~~ WALKER, RPR
Official Court Reporter

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

FILED
2/28/07
COUNTY CLERK
NEW YORK COUNTY

AW